UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America

Plaintiff,

No._____

and

State of Minnesota, by its Attorney General Warren Spannaus, its Department of Health, and its Pollution Control Agency,

Applicant for Intervention,

vs.

Reilly Tar & Chemical Corp.; Housing and Redevelopment Authority of St. Louis Park; Oak Park Village Associates; Rustic Oaks Condominium, Inc.; and Philips Investment Co.,

Defendants.

STATE OF MINNESOTA'S STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

The State of Minnesota, by its Attorney General Warren Spannaus, its Department of Health and its Pollution Control Agency (hereinafter "State"), has moved to intervene in the above referenced action pursuant to Rule 24 of the Federal Rules of Civil Procedure. The State is entitled to intervene in this case as a matter of right under Rule 24(a)(1), Fed. R. Civ. P., and §7002(b)(2) of the Federal Resource Conservation and Recovery Act, (hereinafter "RCRA"), 42 U.S.C. §6972(b)(2), and also under Rule 24(a)(2), Fed. R. Civ. P. If the Court should find that the State is not entitled to intervene as a matter of right, the State urges that it be allowed permissive intervention under Rule 24(b), Fed. R. Civ. P., because of the common questions of law and fact in the State's claims and this action. In addition, as set forth in its proposed complaint in intervention, the State seeks to assert state law claims which are pendent to the federal claim asserted by the United States. These State claims address the same massive contamination of soil and ground water as the federal complaint. Under the standard established in United Mine Workers of America v. Gibbs, 383 U.S. 822 (1966), these claims and the RCRA claim constitute essentially a single case and should be decided together.

STATEMENT OF THE CASE

The subject matter of this action is pollution resulting from the activities of Reilly Tar & Chemical Company (hereinafter "Reilly") in St. Louis Park, Minnesota 1/. Reilly owned and operated an industrial plant engaged in the distillation of coal tar and the treatment of wood products with creosote and other preservatives at an 80-acre site in St. Louis Park from 1917 through 1972. As a result of its operating and waste disposal practices, Reilly has contaminated municipal drinking water supplies in St. Louis Park and created a threat of further ground water contamination in the southern and western suburban area of Minneapolis.

As more fully described in the complaint of the United States, the Reilly operation generated and disposed of coal tar wastes. Coal tar wastes include chemical compounds which are hazardous and carcinogenic. Reilly disposed of these wastes without adequate treatment onto the plant site and to areas adjoining the plant site. As a result of over fifty years of such disposal of coal tar wastes, the subsoil and shallow ground water at and adjacent to the Reilly site are heavily contaminated with these black, oily wastes. Coal tar wastes have saturated the area immediately south of the site to depths of over fifty feet. Smaller amounts of the waste material have been transported into much deeper depths including water bearing rock formations ("aquifers") 260 to 500 feet beneath the ground. In St. Louis Park, as in other communities south and west of Minneapolis, this deep aquifer provides most of the municipal water supply. Because of the danger to human health from even small amounts of certain coal tar compounds, five of St. Louis Park's municipal wells have been closed over the past two years and intensive monitoring of other wells in the area is continuing.

1/ This statement is based primarily upon allegations in the complaint of the United States and the proposed complaint in intervention of the State of Minnesota. No hearing has been held on these allegations in any forum. Many of the allegations have been asserted by the State in an action pending in Hennepin County District Court, State of Minnesota and City of St. Louis Park v. Reilly Tar & Chemical Corporation, File No. 670767. If the State's present motion in this action is granted, the State will seek a stay of the state court proceeding.

For several years prior to the closing of the Reilly plant in 1972, the State engaged in efforts to obtain abatement of Reilly's surface discharges and air emission sources on a voluntary basis. When those efforts failed, the State in conjunction with the City of St. Louis Park brought suit against Reilly in state court in 1970. Shortly thereafter, Reilly shut down the plant, sold the plant site to the City of St. Louis Park, and obtained from the City as a condition of the sale, dismissal of its portion of the lawsuit. The State refused to dismiss its lawsuit, demanding assurance that the pollution problems at the site had been fully investigated and resolved.

In 1974, the Department of Health found elevated levels of phenols, a chemical usually associated with coal tar wastes, in the St. Louis Park municipal wells. At the same time, the Department of Health also found that soil samples from the Reilly site disclosed the presence of polynuclear aromatic hydrocarbons compounds (PAH). Many PAH compounds are found in coal tar and its derivatives.

As a result of the Department of Health's report, the State engaged Barr Engineering Company (Barr) to study the Reilly site and the surrounding area to define the extent of the contamination of the soil and the ground water. This study was conducted from November 1975 through July 1977. The study concluded that there had been extensive contamination of the soil and ground water in the area, and that this contamination contained carcinogenic PAH compounds. The Barr report also recommended additional studies and possible corrective actions.

On the basis of the Barr study and Health Department recommendations, the State in conjunction with the United States Geological Survey commenced in July, 1978, a cooperative project to define the ground water flow and the transport of organic contaminants in the area of the Reilly site, including the development of a computerized model of the ground water and chemical transport system. At the same time, a well abandonment program was instituted by the State to identify all wells on or near the

site and to close or modify those wells which might serve as a pathway for spread of coal tar wastes to the deeper aquifers. Finally, monitoring of municipal water supplies in the suburban area from Minnetonka to Bloomington was undertaken to monitor the spread of the coal tar compounds which have already contaminated the public water supply in St. Louis Park.

Once aware of the serious ground water contamination, the State moved to amend its complaint in the state court action which had been commenced against Reilly in 1970. In September, 1978, the State was allowed to amend its complaint to raise claims of ground water contamination and the City of St. Louis Park was allowed to intervene as a plaintiff. Document production and exchange of written interrogatories have occurred since that date.

ARGUMENT

The State now seeks to intervene in the federal action in order to carry out its obligations to protect the health of its citizens and the integrity of its water resources, and to assure the proper disposition of hazardous wastes. As a practical matter, any order issued by this court in conjunction with the case brought by the United States will affect these vital interests to which the State has devoted thousands of hours and hundreds of thousands of dollars in recent years. Finally, these interests may not be adequately represented by the United States which, in its request for abatement of an "imminent and substantial endangerment" under RCRA, is focusing on the core of the problem but not necessarily representing the several concerns assigned by Minnesota law to the Department of Health and the Pollution Control Agency.

A. THE STATE IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER THE "CITIZEN SUIT" PROVISION OF RCRA AND FEDERAL RULE OF CIVIL PROCEDURE 24(a)(1).

Intervention of right is governed by Rule 24, Fed. R. Civ. P. This rule provides two mechanisms by which a party may assert intervention of right. The first of these is Rule 24(a)(1) which

provides as follows:

> Upon timely application, anyone shall be permitted to intervene in an action: (1) when a Statute of the United States confers an unconditional right to intervene . . .

The statute which confers upon the State a right to intervene in this action is 42 U.S.C. §6972 which provides for intervention by any citizen in actions brought pursuant to RCRA. Although this citizen suit provision has not yet been construed in any reported decision, parallel provisions in other federal environmental legislation have been interpreted to grant an unconditional right to intervene. See, e.g., Ohio ex rel Brown v. Callaway, 497 F.2d 1235 (6th Cir. 1974) (interpreting 33 U.S.C. §1365 of the Federal Water Pollution Control Act Amendments of 1972).

Paragraph (b)(2) of Section 6972 expressly provides that "any person may intervene as a matter of right" in an action brought in a court of the United States by the Administrator of the United States Environmental Protection Agency "to require compliance with [any] permit, standard, regulation, condition, requirement, or order" under RCRA. The first paragraph of the United States' Complaint in this action states that it is brought on behalf of the Administrator and seeks a judgment "that the handling, storage, treatment and disposal of hazardous and other chemical wastes by the defendant Reilly Tar is presenting an imminent and substantial endangerment to health and the environment, within the meaning of . . . 42 U.S.C. §6973". Thus, this suit is an action by the Administrator and does seek compliance with the requirements of RCRA, specitically those requirements relating to hazardous and chemical wastes which pose an imminent and substantial endangerment to health and the environment. Since a State is included within the definition of a "person" under RCRA 2/, the State of Minnesota meets all the requirements under the citizen suit provision of Section 6972(b)(2) and must be granted intervention in the federal claim under Section 6973.

2/ 42 U.S.C. §6903(15).

B. THE STATE IS ALSO ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER THE THREE PART TEST OF FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2).

The second manner in which intervention of right may be established is stated in Rule 24(a)(2) which provides as follows:

> Upon timely application, anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action, and he is so situated that the disposition of the action may as a practical matter impair or impede his abililty to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This rule imposes three requirements on an applicant for intervention as a matter of right: (1) that the applicant possess the requisite interest; (2) that the applicant be situated so that an unfavorable disposition of the action as a practical matter impedes its ability to protect its interests; and (3) that the applicant's interest is not adequately represented by the existing parties. See, e.g., United States v. Reserve Mining Co. 56 F.R.D. 408 (D. Minn. 1972). In applying these criteria, the courts have adopted a liberal construction of the rule seeking practical results which carry forward the policy behind the rule. 7A Wright and Miller, Fed. Practice & Procedure, §1904 (2d ed. 1972). The courts have generally found that those persons who are affected in a practical sense have the right to intervene to present their own evidence and to make their own case. See Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (5th Cir. 1978). As will be demonstrated, the State's application for intervention meets each of these criteria in this case.

1. The State of Minnesota has a direct interest in the subject matter of this action.

In considering the first criteria for intervention of right, the Circuit Court for the District of Columbia stated:

> The "interest" test is primarily a practical guide to disposing of lawsuits involving as many apparently concerned persons as is compatable with efficiency and due process.

Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967). This broad conception of the intervention requirement has been applied in this district in an effort to hear all concerned groups in an environmental dispute. United States v. Reserve Mining Corp., 56 F.R.D. 408 (D. Minn. 1972).

In the present case the obligations of two agencies of the State of Minnesota are inextricably involved in the subject matter of the action. The Pollution Control Agency has been given broad powers to regulate discharges to the waters of the State, to abate pollution of surface and ground water, and to control all aspects of hazardous waste management. See Minn. Stat. §115.03 and §116.07 (1978) 3/. In regard to the Reilly site, the Pollution Control Agency has commissioned the Barr investigation on the effects of Reilly's discharge, has supported Health Department and local efforts to abate the pollution resulting from the Reilly discharges, and has initiated legal action to hold Reilly responsible for the effects of its operations in the State of Minnesota. The interest of the Pollution Control Agency is based upon obligations under state and federal statutes and is substantial.

Similarly, the Department of Health is charged with protecting, maintaining, and improving the health of the citizens of the State. Minn. Stat. §144.05 (1978). It is also responsible for assuring the safety of all public water supplies. Minn. Stat. §§144.381-144.387 (1978). Pursuant to its authority, the Department of Health has investigated the drinking water supply in St. Louis Park and the contamination of the ground water in and about the Reilly site. As part of those investigative efforts, the Department of Health has assessed the risks of coal tar contamination to the health of St. Louis Park residents, recommended withdrawal from public use of wells containing carcinogenic chemicals in excess of World Health Organization standards, properly abandoned private wells which facilitated spread of the contamination, and is currently conducting further studies to determine whether a high incidence of breast cancer in St. Louis Park may be related to the coal tar contamination of the municipal water supply. Because the danger to the St. Louis Park drinking water supply is the gravamen of the United States' complaint and

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3/ The Pollution Control Agency is currently in the process of assuming from the Environmental Protection Agency full responsibility for control of hazardous wastes within Minnesota's borders pursuant to 42 U.S.C. §6926 and 40 CFR Part 123.

because the Department of Health has primary responsibility for the safety of that water supply, it has a substantial interest in this action.

Paragraphs 9 - 11 of the proposed Complaint in Intervention briefly discuss the extensive efforts of the State in investigation, abatement, and enforcement with regard to the ground water problem in St. Louis Park. Recognizing the expertise needed to deal with this problem, the State has sought the assistance of the United States Geological Survey and Environmental Protection Agency. The State's interest in the problem remains strong, and satisfies the first test of Rule 24(a)(2).

2. The disposition of this case is likely to impair the ability of the State of Minnesota to protect its interests in health and the environment.

The second criterion for evaluating the right to intervene under Rule 24(a)(2) is the practical effect of an adjudication on the interest of the applicant. This criterion is not intended to involve a test of res judicata effect but is intended to focus on the practical implications of a judgment on the applicant. See 3B Moore's Federal Practice, §24.09(3)(2d ed. 1980); Atlantis Development Corp. v. United States, 379 F.2d 818, 829 (5th Cir. 1967).

As measured by this practical criterion, there can be no doubt that the interests of the State of Minnesota will be affected by an adjudication in this matter. Perhaps the most important effect on the State's interests is the question of remedial measures. Virtually any remedy sought by the United States will necessarily involve the State's regulatory responsibilities for transportation and disposal of hazardous material, control of discharges to surface waters and sewer systems, protection of ground water, and provision of safe drinking water. Indeed, any remedial plan is certain to require approvals from and the assistance of the Pollution Control Agency, the Department of Health, and perhaps also the Minnesota Department of Natural Resources 4/.

4/ The authority of the Department of Natural Resources over uses of the surface and ground water of the State is set forth in Minn. Stat. §§105.37-105.55 (1978)

As has been noted earlier, the State of Minnesota has commenced an action in state district court seeking comprehensive relief with respect to soil and ground water problems associated with the Reilly site. The possibility of inconsistent and excessive litigation with respect to the same subject matter is sufficient in itself to satisfy the impairment of interests test of Rule 24(a)(2). United States v. Reserve Mining Co., supra; Atlantis Development Corp. v. United States, supra; Nuesse v. Camp, supra. Moreover, this Court is the only forum which can adjudicate both the claims of the State and those of the United States. The State is prepared to seek a stay of the state court proceeding and assert its enforcement interests in this forum. Such a result would serve the goals of judicial efficiency and of facilitating participation by all interested persons.

The State's interests are already involved in the St. Louis Park ground water problem and any action sought by the United States to remedy the problem will affect the State's exercise of its regulatory and enforcement powers. Accordingly, the State of Minnesota meets the second criterion for intervention of right under Rule 24(a)(2).

3. The State of Minnesota's interests may not be adequately represented in this case by the existing parties.

The final criterion is the adequacy of the representation of the interests of the State of Minnesota in the case. While there appears to be no agreement over who has the burden of showing that an applicant's interests will not be adequately represented, it is clear that this is a minimal requirement and should be liberally construed in favor of intervention. See Trbovich v. United Mine Workers, 404 U.S. 528, 538, n. 10 (1971). This criterion does not require as a condition for intervention bad faith or misfeasance on the part of existing counsel. See Atlantic Refining Co. v. Standard Oil Co., 304 F.2d 387, (D.C. Cir. 1962). Rather, representation has been found to be inadequate where the proposed intervenor has sought to assert different or additional grounds in support of the proposed representative position or to assert a

broader interest than that of the existing parties. See Nuesse v. Camp, supra.

In initiating the present case, the United States is carrying out the RCRA objectives set forth in 42 U.S.C. §6901(b) of protecting the environment and health from improper hazardous waste disposal. While these objectives dovetail with the objectives of the State, the State's common law and statutory claims offer additional legal grounds to establish the liability of Reilly Tar to abate the pollution condition.

Moreover, the State has a broader interest than the federal government because of the continuing statutory responsibilities for protecting and regulating its natural resources. These responsibilities have been previously identified, supra, at 7-8. In gaging the State's interest, it should be noted that the enforcement of environmental control laws is an area that has traditionally been reserved to the states as a matter of primary responsibility. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); United States v. Allegheny Ludlum Industries, Inc., 507 F.2d 826 (5th Cir. 1975). This has been particularly true in dealing with the area of hazardous wastes. The House Report on RCRA described it as an "area which has traditionally been considered the sphere of local responsibility." H.R. Rep. No. 94-1491, 94th Cong. 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Ad. News 6238, 6240. It is also significant that hazardous wastes and ground water are areas for which the State of Minnesota has developed strong regulatory programs. See Minn. Rule WPC 22, (6 MCAR 4.8022) (ground water protection); Minn. Stat., ch. 156A (1978) (water well regulation); Minnesota Hazardous Waste Rules, 6 MCAR §4.9001, et seq.; and the Waste Management Act of 1980, Minn. Laws 1980, ch. 564.

In a recent decision in another action by the United Sates to abate ground water contamination under 42 U.S.C. §6973, the federal district court for Connecticut held that local environmental interests may not be adequately represented by the United States and must be allowed to represent their own viewpoints.

United States v. Solvent's Recovery Service, No. H 79-704 (D. Conn., August 21, 1980) 5/. Intervention was sought in that action by local residents, citizen groups, and the town board of water commissioners 6/. The court found that all applicants had interests in the action as users or supervisors of the town water supply, and that the disposition of the action would as a practical matter impact their interests. The court held that the applicants were not adequately represented even though it found a "general congruence of the objectives" of the United States and the applicants. It noted that the applicants and the federal government might subsequently take different views as to the relief which would be appropriate and might also develop differences based on the federal government's desire to vindicate certain public policies and statutory interpretations.

The possibilities in the present case for divergence of objectives between the State and the United States are greater than those which were held to justify intervention in Solvent's Recovery Service. These possibilities arise because technical judgments may differ on appropriate relief, because of the extensive regulatory control of the State over uses of ground and surface water, provision of public water supplies, and management of hazardous wastes, and because the State's broader responsibilities require it to evaluate many competing demands on its natural resources from both the present population and from future generations 7/.

5/ A copy of this decision is attached to the brief and has been provided to all parties.

6/ As in the case at bar, intervention was also sought under Rule 24(a)(1), Fed. R. Civ. P., and the citizen suit provision of 42 U.S.C. § 6972(b)(2). Since the court granted intervention of right under Rule 24(a)(2), Fed. R. Civ. P., it found it unnecessary to address the arguments under Section 6972(b)(2).

7/ Minnesota's Environmental Policy Act (Minn. Stat. Ch. 116D) and Environmental Rights Act (Minn. Stat. Ch. 116B) require careful review of alternatives prior to State issuance of permits and other state actions which may significantly affect the quality of the environment.

For these reasons, the interests of the State may not be adequately represented and the State should be granted intervention of right under Rule 24(a)(2).

C. THE COURT SHOULD EXERCISE ITS DISCRETION TO ALLOW THE STATE TO INTERVENE PERMISSIVELY UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(b)(2)

If the Court should conclude that the State's intervention is not appropriate as as matter of right, then it should permit the State to intervene under Rule 24(b)(2), Fed. R. Civ. P. This rule, which governs permissive intervention, provides in pertinent part:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Under this rule the criteria for permitting intervention are the existence of a common question of fact or law and the absence of undue delay or prejudice. As to the second criterion, it is clear that the State's intervention will not delay this action or prejudice the defendants. The case has just been commenced by the United States and the State has presented its Motion for Intervention contemporaneously with the service of the United States' complaint. Accordingly, there can hardly be delay at this point, much less "undue delay", caused by the State's intervention. Because of the substantial common proof shared by the state and federal claims, there is little likelihood of undue delay at later points in the proceedings.

Similarly, Reilly and the other defendants will not be prejudiced by the intervention of the State. The claims presented by the State are similar to those which Reilly faces in the related state court action. Presentation of those claims to the federal court merely consolidates the federal and state claims in the federal forum in a way in which they could not be combined in state court. Since Reilly must face both federal and state claims in any event, this consolidation of claims can not cause prejudice to it.

The final criterion of a common question of fact or law is also satisfied. Each of the claims presented by the State and the United States require proof of the facts surrounding Reilly's activities within the State of Minnesota and the effects of those activities on the environment and citizens of Minnesota. Specifically, the state and federal claims will include evidence on the disposal of wastes, the present location of those chemical wastes in the soil and ground water, and the effects caused by those wastes. Indeed, virtually the same facts underlie both the federal and state claims. There are clearly common questions of fact; thus satisfying the final criterion.

Since the State fits all of the criteria for permissive intervention, the Court should exercise its discretion and allow the State to intervene so it can be heard on the federal claim and to assert the related State claims presented in the proposed Complaint in Intervention 8/. The State of Minnesota simply should not go unhead on a matter to which it has already devoted considerable effort and which is of such vital concern to its environment.

D. THE STATE OF MINNESOTA SHOULD BE ALLOWED TO ASSERT STATE LAW CLAIMS WHICH ARE PENDENT TO THE CLAIM UNDER RCRA.

In addition to its intervention in the suit brought by the United States, the State of Minnesota also seeks to assert state law claims which are pendent to the action brought by the United States. These claims seek abatement of the risks to health and the environment and reimbursement of State expenditures to

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8/ The appropriateness of trying the state law claims with the RCRA claim is discussed infra at 13-15. While there are decisions holding that an independent basis of jurisdiction is required to assert additional claims in permissive intervention, these occur primarily in the diversity jurisdiction context. There is no reason to assert that limitation in actions such as the present case where jurisdiction is conferred on the federal court by a statute specifically addressed to the subject matter. To do so would frustrate any common sense notion of judicial economy and convenience by requiring separate adjudications of the state and federal claims even though virtually all of the facts are the same. Judicial efficiency as a basis for entertaining pendent claims in permissive intervention is urged in Row, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963, 990 (1979).

define the problem and limit its spread. While the pendent claims are based on Minnesota statutory and common law, it would serve judicial economy and convenience to determine them in a single action with their counterpart federal claim. Such consolidation is particularly appropriate in the present situation when basically all that would be required for determining liability on the pendent claims is application by the court of additional legal theories to a common set of evidence.

The test for consideration of pendent jurisidiction over state claims is stated in United Mine Workers of America v. Gibbs, 383 U.S. 727 (1966). In that case the Supreme Court stated:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under the Constitution, the Laws of the United States and Treaties made or which shall be made under their Authority. . . ' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'. The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

Gibbs, 383 U.S. at 725 (citations and footnote omitted).

As indicated in the above quoted passage, there are essentially three requirements for the exercise of pendent jurisdiction. First, the federal claim must be substantial. Second, the state and the federal claims must arise from the same common nucleus of operative facts. Third, the claims must be of a type ordinarily tried as a single case. It is readily apparent that the State of Minnesota meets all three of these criteria with respect to the pendent claims it seeks to assert in the present case.

With respect to the first criterion, the claim of the United States under 42 U.S.C. §6973 is a substantial one. The claim clearly states a federal cause of action. The Administrator of the Environmental Protection Agency, presumably on the basis of technical data available to him, has recommended this action to

abate an imminent and substantial endangerment. The Department of Justice has brought the action on the Administrator's behalf.

The second, and most crucial test, is that the claims must derive from a common nucleus of operative facts. In the present case, almost entirely the same facts underlie both the federal and the state causes of action. Both the State and the United States will seek to show Reilly's disposal of wastes, the present location of contaminants in the soil and ground water, and the risks posed by those contaminants. This proof will entail the use of the same historical witnesses, hydrologists, geologists, epidemiologists, and toxicologists. Several of these witnesses are likely to be State employees or consultants, and most of the exhibits will be common to both the State and federal claims. The only practical distinction which can be made between the pendent claims sought to be presented by the State of Minnesota and the RCRA claim is with respect to the legal theories that must be applied to the common facts. Accordingly, the State meets the second criterion for exercise of pendent jurisdiction.

The third criterion, the "single case" test, is to be liberally construed. The Court in Gibbs observed:

> Under the rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged.

Gibbs, 383 U.S. at 724. Certainly the State's pendent claims and the RCRA claim constitute the type of case which would ordinarily be expected to be tried in one judicial proceeding. That, of course, would be the result if either the United States or the State of Minnesota had the authority to assert all the claims set forth in the federal and state complaints. Thus, the third criterion set forth in Gibbs is satistied.

Under the standard set forth in Gibbs, the court clearly has the power to exercise pendent jurisdiction with respect to the state law claims set forth in the State's complaint in intervention. Ultimately, the decision to exercise this power is one that is discretionary with the court. See Gibbs, 383 U.S. at 726. The exercise of this discretion is peculiarly appropriate in the present case since the common and highly technical nature of the evidence which underlies both the federal claim and the pendent claims makes a compelling case for trial before a single finder of fact. Acceptance of the pendent claims would promote the efficient utilization of judicial resources and would not cause any unfairness to the parties.

Assertion of pendent jurisdiction over the state claims in the present context would be very similar to other exercises of the doctrine of pendent jurisdiction. See, 3A J. Moore, Federal Practice ¶ 18.07 (2nd ed. 1980). Thus, the State urges the Court for the sake of judicial economy, convenience, and fairness to assert its power of pendent jurisdiction in the present case and to undertake the task of applying state law to essentially the same facts which underlie the federal claim.

CONCLUSIONS

For the foregoing reasons, the State of Minnesota respectfully submits that this Court should allow intervention by the State in the above referenced action and that the Court should assert pendent jurisdiction over the state law claims set forth in the proposed complaint in intervention.

Respectfully submitted,

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DISTRICT OF CONNECTICUT

CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

UNITED STATES OF AMERICA :

v. : CIVIL ACTION NO. H 79-704

SOLVENTS RECOVERY SERVICE :
OF NEW ENGLAND and
LORI ENGINEERING COMPANY :

RULING ON MOTIONS TO INTERVENE

JOSÉ A. CABRANES, District Judge:

Two motions to intervene have been filed in this action, which was brought by the United States to abate and remedy groundwater pollution (allegedly caused by the waste disposal practices of the defendants) that has resulted in the contamination of part of the water supply of Southington, Connecticut. The first motion to intervene was filed jointly by the Connecticut Fund for the Environment, Inc., the Southington Citizens Action Group, and four Southington residents -- Edward Avery, Joan Bradley, Edwina Ledecke and Gladys Langton. The second motion was filed by the Board of Water Commissioners for the Town of Southington. For the reasons set forth below, the court grants both motions, on the ground that the applicants for intervention are entitled to enter this case as plaintiffs under Rule 24(a)(2), Fed. R. Civ. P.

Rule 24(a) provides that:

> [u]pon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so

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situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Although the applicants claim a statutory right to intervene under section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, and Rule 24(a)(1), Fed. R. Civ. P., the court need not address that contention, which raises new questions of statutory interpretation, since the three requirements for nonstatutory intervention under Rule 24(a)(2) are satisfied here.[1] Those three requirements -- the existence of "an interest relating to the property or transaction which is the subject of the action," the position of the applicant as one "so situated that the disposition of the action may as a practical matter impair or impede [the applicant's] ability to protect that interest," and the circumstance that the applicant's interest is not "adequately represented by existing parties" -- are discussed below, in the context of the pending motions.

The Applicants' Interests in the Subject of the Action

The principal subject matter of this litigation is the pollution, through groundwater contamination, of the drinking water of the Town of Southington. The individual applicants for intervention are Southington residents who drink the town's water and claim to have ingested water contaminated as a result of the defendants' activities. The two associations which have moved to intervene include among their members Southington residents who drink the town's

water, including the polluted drinking water from the wells which were allegedly contaminated by the defendants' disposal practices. See Proposed Complaint of Applicants for Intervention Connecticut Fund for the Environment et al., ¶¶ 5-10. The strength of their interest is indicated by the many hours of work performed by these would-be intervenors in support of their complaint to the Environmental Protection Administration concerning the situation which, partly as a result of their efforts, later became the subject of this action. The Board of Water Commissioners has a different, but equally compelling, interest in the water supply which was allegedly polluted by the defendants; the Board is obligated by special act of the Connecticut General Assembly[2] to provide drinking water for the Town of Southington, and is responsible for the maintenance of the wells which are at issue here.

The defendants do not deny that the interests of these applicants in the "property or transaction which is the subject of the action" meet the first requirement for intervention as of right under Rule 24(a)(2), and the court finds those interests sufficient.

The Practical Effect of Disposition of This Action on the Applicants' Abilities to Protect Their Interests

As in the case of the first prerequisite under Rule 24(a)(2), the defendants have not contested the applicants' contention that they meet the second requirement under that rule: i.e., that they are "so situated that the disposition of the action may as a practical matter impair or impede [their] abilit[ies] to protect" their interests in the

subject of the litigation. Under this standard, all that is necessary is that the disposition of the case in the applicants' absence may "put the applicant[s] at a practical disadvantage in protecting [their] interest[s]." 7A C. Wright and A. Miller, Federal Practice & Procedure § 1908 at 515 (1972). The court agrees with the applicants that this criterion is satisfied here, since the disposition of this case (which may be by an order granting broad remedies for cleaning up the town's water supply, or one granting only narrow injunctive relief against future acts of disposal, or one granting no relief at all) will inevitably have a direct effect on the interests of those who must use, and those who must provide, the drinking water of the Town of Southington. As a practical matter, their interests will be litigated in this case; if the matter is litigated in their absence, they may be unable to protect those interests.

The Adequacy of the Representation of the Applicants' Interests by the United States

While conceding by their silence that the applicants for intervention satisfy the first two requirements of Rule 24(a)(2), the defendants strenuously object to the putative intervention on the ground that the applicants' interests are "adequately represented" by the United States.

The Court of Appeals for the Second Circuit has held that "[a]n applicant for intervention as of right has the burden of showing that representation may be inadequate, although the burden 'should be treated as minimal.'" United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978) (emphasis added), quoting Trbovich v. United Mine

Workers, 404 U.S. 528, 538 n.10 (1972). The applicants' burden is therefore limited to establishing a serious possibility that the United States may not prove an adequate representative of their interest. See Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1969); Nuesse v. Camp, 385 F.2d 694, 704 (D.C. Cir. 1967); 7A C. Wright & A. Miller, supra, § 1909 at 521.

Although the record is necessarily incomplete at this early stage of the litigation, the court is convinced that there is a serious possibility that the objectives of the United States and those of the applicants for intervention may diverge in the course of this lawsuit, particularly with respect to the complex questions concerning what relief, if any, is appropriate. The United States has filed a memorandum in support of the motions of the putative intervenors, alluding to possible conflicts between its goals (which include the vindication of certain public policies and statutory interpretations advocated by the EPA and the Department of Justice) and the special interests of the applicants, among whom are some of the individuals most directly affected by this controversy. Significantly, the inability of the United States to assure the Board of Water Commissioners that the government would protect the Board's special interests throughout this litigation may have been a factor in the latter's decision to apply for intervention.[3]

While the Department of Justice is generally deemed an adequate representative of the broad public interest in cases analogous to this one, see 7A C. Wright & A. Miller, supra, § 1909 at 530-31, narrower interests are asserted

here by those who consume the drinking water of the Town of Southington and those who are charged with the duty of supplying that water. It appears likely that the applicants for intervention, with their special narrower interests in Southington's water supply, will make "a more vigorous presentation" of those interests than the United States can be expected to do. See National Resources Defense Council v. Costle, 561 F.2d 904, 912-13 (D.C. Cir. 1977); New York Public Interest Research Group v. Regents of the University of the State of New York, 516 F.2d 350, 352 (2d Cir. 1975) (per curiam); cf. National Farm Lines v. ICC, 564 F.2d 381, 383-84 (10th Cir. 1977). The role of some of the would-be intervenors in bringing this matter to the government's attention (to which the court has already alluded) is evidence of the vigor with which these putative intervenors can be expected to pursue their interests.

On balance, the circumstances here militate in favor of the application for intervention in spite of the general congruence of the objectives of the United States and the prospective intervenors. See United States v. Reserve Mining Co., 56 F.R.D. 408, 418 (D. Minn. 1972) ("While there may be a similarity of interests asserted between the environmental groups [applying to intervene] and the United States, the similarity does not necessarily mean that there will be adequate representation of those interests by the United States"). The applicants have persuaded the court that their interests may not be adequately represented by the government; the final prerequisite for intervention as of right under Rule 24(a)(2) has been satisfied.

Conclusion

For the foregoing reasons, the applicants for intervention are entitled to intervene as plaintiffs under Rule 24(a)(2), Fed. R. Civ. P. Their motions are accordingly granted.

It is so ordered.

José A. Cabranes
United States District Judge

Dated at Hartford, Connecticut, this 21st day of August, 1980.

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FOOTNOTES

1. For this reason, there is no need to consider the applicants' alternative argument that they be permitted to intervene under Rule 24(b), Fed. R. Civ. P., or the defendants' contentions in opposition to such permissive intervention, including the alleged lack of any independent ground of federal jurisdiction over the claims of the applicants for intervention.

2. Special Law No. 468, 13 Special Laws of the General Assembly 609 (1901). This statute conferred upon the Board of Water Commissioners the powers and duties originally granted to the Southington Water Company, which was chartered in 1882 by Special Law No. 198, 9 Special Laws of the General Assembly 609 (1882). The town purchased the water works, pursuant to Special Law No. 468, by vote of the town meeting on November 5, 1901. The history of the municipality's acquisition of its water supply is recounted in Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A. 1023 (1908), in which the Supreme Court of Errors sustained the town's purchase of the water works.

3. Government's Memorandum in Support of Intervention, pp. 2-3.